

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, <i>et al.</i>)	
)	
Plaintiffs,)	
)	
v.)	Case No. 4:05-cv-00329-GKF-PJC
)	
TYSON FOODS, INC., <i>et al.</i>)	
)	
Defendants.)	
)	

**REPLY IN SUPPORT OF DEFENDANTS' MOTION IN LIMINE TO EXCLUDE
REFERENCES TO BACTERIA, AND BACTERIA-RELATED DISEASES OR OTHER
ALLEGED ADVERSE HUMAN HEALTH EFFECTS ASSOCIATED WITH ANYTHING
OTHER THAN PHOSPHORUS**

Plaintiffs' Response in Opposition to Defendants' Joint Motion in Limine to Exclude References to Bacteria, and Bacteria-Related Diseases or Other Alleged Adverse Human Health Effects Associated with Anything Other Than Phosphorus, Dkt. No. 2515 ("Opposition") fails to direct the Court to any reliable evidence supporting the assumption that bacteria in IRW waters derive from poultry instead of from any other source. Plaintiffs' bacteria case relies entirely on the presence of indicator bacteria in IRW waters. Yet those bacteria have literally hundreds of sources in the IRW, including some, such as cattle and waste water, that are plentiful and are deposited directly into or proximate to the waters in question. Bacteria from poultry litter, on the other hand, are deposited in growing houses and are subject to hostile conditions there and on fields. As this Court and the Tenth Circuit have recognized, Plaintiffs have done no fate and transport work to confirm that bacteria from poultry litter survive those conditions and reach IRW waters. Moreover, the Court has now excluded the evidence Plaintiffs designed to circumvent this problem, Professor Harwood's and Dr. Olsen's source tracking theories. Without some such proof, Plaintiffs cannot distinguish between indicator bacteria from any particular sources, let alone prove that they derive from poultry. Because Plaintiffs cannot prove causation, and therefore cannot attribute risk associated with indicator bacteria to poultry, it would be highly prejudicial to allow Plaintiffs to offer otherwise irrelevant evidence of bacteria, diseases, and other related conditions. *See* Fed. R. Evid. 401-403. Plaintiffs' Opposition focuses principally on the low hurdles they believe they face under their various legal theories. But none of these alleviates them of the need to prove causation, which they cannot do.¹ This trial should be about, and only about, phosphorous.

¹ *See Angell v. Polaris Prod. Corp.*, 280 Fed. Appx. 748, 2008 U.S. App. LEXIS 12007 (10th Cir. June 4, 2008); *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 114 (Mo. 2007); *Twyman v. GHK Corp.*, 93 P.3d 51, 54 n. 4 (Okla. Civ. App. 2004).

DISCUSSION

Defendants' *Motion in Limine to Exclude References to Bacteria, and Bacteria-Related Diseases or Other Alleged Adverse Human Health Effects Associated with Anything Other Than Phosphorus*, Dkt. No. 2408 ("Motion"), demonstrated that Plaintiffs cannot carry forward a case based on health effects occasioned by bacteria, other alleged constituents of poultry litter listed in their Complaint other than phosphorous,² or related to anti-microbial or anti-bacterial resistant bacteria. *See* Mot. at 1-4. Plaintiffs' Opposition makes no effort to defend the latter two. Therefore, this motion should be granted at least insofar as it pertains to health effects associated with anything other than bacteria or phosphorous. Moreover, it ought to be granted as to any evidence pertaining to resistant bacteria in the IRW. *Id.* Finally, the motion ought to be granted as to bacteria generally, as such evidence would be irrelevant and highly prejudicial.

I. REFERENCES TO CONSTITUENTS OTHER THAN PHOSPHORUS OR BACTERIA OR TO ANTIBIOTIC-RESISTANT BACTERIA SHOULD BE EXCLUDED AS IRRELEVANT AND PREJUDICIAL

As demonstrated in the Motion, while the Complaint lists a litany of alleged constituents from poultry litter, Plaintiffs have not developed any evidence linking such constituents in the IRW with poultry litter, and have developed no evidence associating any health effects with Defendants. Mot. at 1-3. Moreover, Plaintiffs have indicated an intention to focus solely on bacteria and phosphorous at trial. *See* Dkt. No. 2062, at 59-61 (trial claims limited to phosphorus and bacteria). Therefore, references to alleged constituents such as arsenic or hormones, particularly with regard to any health effects, would be irrelevant. The Motion similarly demonstrated Plaintiffs' lack of evidence to prove the presence of any resistant bacteria in the IRW, or to associate any such bacteria with Defendants. Mot. at 3-4. Plaintiffs make no

² Thus, this Motion does not reach Plaintiffs' health impact allegations regarding disinfection by-products or blue-green algae purportedly associated with phosphorous.

response at all on this issue. Because they have no such proof, any references to such bacteria would be irrelevant to the issues and designed only to prejudice Defendants. All such evidence should therefore be excluded as irrelevant and prejudicial under Rules 401, 402, and 403.

II. EVIDENCE AS TO BACTERIA OR RELATED HEALTH EFFECTS IS IRRELEVANT BECAUSE PLAINTIFFS CANNOT SHOW THAT BACTERIA IN IRW WATERS DERIVE FROM LAND-APPLIED POULTRY LITTER

Evidence is only relevant to the extent that it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Fed. R. Evid. 401. “Evidence which is not relevant is not admissible.” Fed. R. Evid. 402. Evidence pertaining to bacteria, bacteria-related diseases, or other such health effects that cannot be attributed to Defendants are by definition irrelevant. Moreover, such evidence is designed to inflame the fact finder and should be excluded as unduly prejudicial under Rule 403.

A. Because They Failed To Undertake Any Fate And Transport Analysis Of Any Bacteria In The IRW, Plaintiffs Cannot Prove Causation To Associate Bacteria In IRW Surface Waters With Defendants

Unable to identify any people sickened by exposure to poultry litter in the IRW and unable to find any actual pathogens, Mot. at 3-4, Plaintiffs’ bacteria-related health case relies entirely on the risk of illness associated with the presence of indicator bacteria in IRW waters. *See* Opp. at 1-2, 10 (Teaf indicator bacteria “mass balance”); *id.* at 4, 11 (Olsen testing of indicator bacteria in edge of field samples). The difficulty with this approach, however, is that, as Plaintiffs’ experts have admitted repeatedly, these indicator bacteria are shed by every warm blooded mammal in the IRW. *See* P.I.T. at 239:22-240:6, 694:9-696:16, 1420:20-1421:6, 1434:1-1437:13, 1856:14-1860:20, 2063:20-2068:24 (Ex. B); Ex. C (Lawrence 1/28/2008 Dep.) at 52:9-14. For example, even Plaintiffs’ experts acknowledge that cattle, swine, and wastewater treatment facilities daily deposit millions of bacteria directly into IRW waters. *See* Ex. D, Teaf

Rep. at Table B4. Therefore, Plaintiffs must offer some basis to conclude that indicator bacteria from poultry, as opposed bacteria from other sources, show up in IRW waters.³

Plaintiffs developed their PCR and PCA theories specifically to address this problem. Each was designed to allow Plaintiffs to point to markers in the environment as proof that nearby indicator bacteria must also come from poultry. *See generally* Dkt. No. 2028 (Harwood *Daubert* motion); Dkt. No. 2082 (Olsen *Daubert* motion). However, the Court found these theories to be unreliable and inadmissible under *Daubert*. *See* 7/28/09 Transcript at 247:13-252:7 (Dr. Harwood) (Ex. E); 7/29/09 Transcript at 373:22-377:6 (Dr. Olsen) (Ex. F). Plaintiffs do not identify any other evidence linking bacteria in IRW waters directly back to poultry litter.

Instead, Plaintiffs attempt to work around the exclusion of their causation experts by stretching their remaining bacteria-related witnesses to fill that gap. Plaintiffs rely principally on the “mass balance” offered by Dr. Teaf, arguing that given the volume of bacteria he calculates, some simply must reach IRW waters. Opp. at 1, 2, 10. But even accepting Dr. Teaf’s calculations *arguendo*, he does not carry Plaintiffs where they want to go. All he does is calculate a volume of bacteria generated by some sources in the watershed. Opp. at 10. But the relevant question is not how much bacteria is deposited *in the watershed*, but rather what bacteria *actually reaches IRW waters*. As to that latter question, Dr. Teaf offers no independent analysis as neither he, nor any other Plaintiffs’ expert, performed any fate and transport analysis on

³ Plaintiffs note the Tenth Circuit’s observation that there were “two permissible views” of the evidence. *See* Opp. at 2. But this recognized the district court’s discretion in resolving the preliminary injunction motion. The Tenth Circuit additionally faulted Plaintiffs for failing to perform any “fate and transport study to establish that any surviving bacteria from poultry litter actually reached the waters of the IRW.” *Attorney General of the State of Oklahoma v. Tyson Foods, Inc.*, 565 F.3d 769, 778 (10th Cir. 2009). The question now is whether Plaintiffs have adduced any additional evidence to supply the missing causation proof. Clearly, they have not, leaving unchanged Plaintiffs’ “inability to link land-applied poultry litter to the bacteria in the IRW.” *Tyson*, 565 F.3d at 778.

bacteria. Indeed, Plaintiffs avoided Defendants' *Daubert* motion as to Dr. Teaf only by conceding specifically that he is not a causation expert. As the Court concluded, "Mr. Bullock has stated clearly that [Teaf] is not the plaintiffs' witness regarding causation and I think that simply settles the matter." 8/13/09 Transcript at 87:14-16 (Ex. A); *see id.* at 87:17-20 (acknowledging that Dr. Teaf offers no transport opinion); 7/29/09 Transcript at 398:5-10 (Ex. F) (acknowledging that Dr. Teaf "can't testify as to causation" and that his two principal areas of testimony "don't prove causation").

As the Court has recognized, the need for fate and transport work here is especially acute. *See* 7/28/09 Transcript at 196:13-17, 249:2-16 (Ex. E). Plaintiffs can point to no testimony or evidence to support the conclusion that any bacteria from poultry operations survive the conditions to which they are exposed long enough to enter IRW waters. The undisputed record is that bacteria are killed by sunlight, temperature change, pH change, desiccation, sorption, and predation. *See* Dkt. No. 2050 at ¶27. Bacteria from poultry are subjected to partial composting in growing houses or storage facilities before being spread in a thin layer on fields where exposure to sunlight may kill them within a matter of hours. *See* P.I.T. at 636:2-636:7, 687:9-688:12; 1850:4-11 (Ex. B). Moreover, litter is applied pursuant to state laws and regulations which prohibit its application near to surface waters or other ready transport routes. *See, e.g.*, 2 Okla. Stat. § 10-9.7 (setting forth best management practices for animal waste management plans); Okla. Admin. Code § 35:17-5-5. It therefore cannot simply be assumed that bacteria from poultry reach IRW waters. Finally, in contrast, the bacteria deposited from *inter alia* cattle, wildlife, and waste water treatment facilities, is deposited near or even directly into IRW waters. *See, e.g.*, Ex. G (Olsen 2/2/08 Dep.) at 135:10-15 (acknowledging that he has "seen evidence of [cattle] in the stream").

Plaintiffs nevertheless rely on Dr. Teaf's conclusion "that poultry waste is a significant contributor to the bacterial pollution of IRW waters" based on his "weight of evidence" analysis. Opp. at 10. But this "analysis" relied expressly on the Harwood PCR and Olsen PCA theories, which the Court has already expressly prohibited Dr. Teaf from relying on. *See* 8/13/09 Transcript at 87:7-10 (Ex. A)("[O]bviously to the extent that [Teaf] originally intended to rely on Harwood's biomarker theory and/or Olsen's PCA theory and conclusions, he will not be permitted to do that at trial.").⁴ The fact is that Dr. Teaf offers no independent analysis to support any belief that bacteria from poultry litter reach IRW waters so as to pose a health risk.⁵

Plaintiffs also offer testimony from several other experts in an effort to meet their causation burden, but none of these offers anything more than Dr. Teaf. First, Plaintiffs cite Dr. Harwood's testimony regarding health effects in the IRW, Opp. at 10-12, that the Court has already explicitly excluded. True, the Court did not exclude Dr. Harwood's testimony entirely; but the *only* open question regarding Dr. Harwood is "whether she might be able to testify to other more generalized health risks from fecal indicator bacteria." 7/28/09 Transcript at 251:24-25 (Ex. E). The Court specifically precluded her from testifying as to IRW-specific health risks because her Rule 26 Report based those conclusions on her biomarker. As the Court observed,

⁴ Dr. Teaf has separately made clear that he relied on Dr. Olsen's PCA to associate bacteria in IRW waters with poultry litter. *See* Ex. H (Teaf 1/31/2008 Dep.) at 221:15-20 (recognizing that a number of sources of bacteria in the waters of the IRW "are possible, but I think, based on the information that's available to me from – particularly from Dr. Olsen through the chicken and bacterial fingerprinting signatures, it's clear that the bacteria are far more likely to be related to the chickens than the cow"). Dr. Teaf cannot now supplement his own lack of expertise in causation with inadmissible "lines of evidence."

⁵ The balance of the materials Plaintiffs cite in support of their effort to make Dr. Teaf their causation expert are irrelevant or relate to quantity but not transport. Dkt. No. 2062 ¶¶ 42-48 and Dkt. No. 2067, Ex. 3 at ¶14 discuss phosphorus, which is not at issue in this motion, and Dkt. No. 2067, Ex. 3 at ¶33 discusses the general practice of adding antibiotics to farm feed, which is similarly irrelevant to fate and transport. And Dkt. No. 2067, Ex. 3 at ¶¶ 31, 32, and 35 regards the quantity of bacteria deposited, not where it gets to.

[C]ontrary to the argument that Dr. Harwood reached her health risk conclusion independent from her work on the biomarker, her Rule 26 report recognizes that the biomarker is her link between poultry litter and allegations of health risk from human pathogens such as salmonella and campylobacter.

Id. at 251:14-18. Plaintiffs' renewed effort to uncouple Dr. Harwood's IRW-specific testimony from her biomarker, *see* Opp. at 2-4, 10-12, directly contradicts this ruling.

In any event, generalized testimony from Dr. Harwood or anyone else regarding indicator bacteria would be irrelevant without some causation evidence. But apart from her biomarker, Dr. Harwood offered no other causation evidence. As she admitted candidly at her deposition, she (along with every other Plaintiffs' expert) has not studied how any particular bacterium moves or persists in the IRW. *See* Harwood July 2008 Dep. at 9:9-14:11 (Ex. I). Therefore, Dr. Harwood has no basis upon which to testify whether any indicator bacteria in IRW waters come from poultry, as opposed to from any other source.

Plaintiffs also suggest, at this late date, that Dr. Fisher is a "fate and transport" witness. *See* Opp. at 11. But Dr. Fisher is a geologist with no particular expertise in bacteria. While he certainly may testify regarding the degree to which water may flow through fractured rock structures, he has no basis to offer any fate and transport opinion specifically as to bacteria. In particular, he cannot testify whether bacteria survive conditions in the growing houses, survive being land applied and exposed to UV radiation, and survive soil sorption long enough to be carried into groundwater. Nor can he testify as to the rate at which bacteria survive or move underground. Unsurprisingly, the excerpt of Dr. Fisher's Report that Plaintiffs attach to their Opposition contains no such opinions. *See* Opp. Ex. 1. And, pursuant to Rule 26, it is too late for Dr. Fisher to form them now.

Plaintiffs also offer Dr. Olsen's "pathway" analysis as fate and transport work. *See* Opp. at 11. But the Tenth Circuit previously rejected this very analysis as insufficient given the

abundant alternate sources of bacteria in the IRW. *See Tyson*, 565 F.3d at 778 (Plaintiffs “failed to conduct a fate and transport study”). Dr. Olsen’s “pathway” analysis examines the bacterial content of poultry litter, edge of field samples, surface waters, etc., and assumes that because indicator bacteria are found in each, those bacteria must have come from poultry. But Plaintiffs have no support for this assumption. For example, as Dr. Olsen has now admitted, his edge-of-field samples were uniformly impacted by cattle manure. *See* Ex. J (Olsen 9/10/08 Dep.) at 61:19-66:4; Ex. K (photographs of cows at edge-of-field locations). Similarly, Dr. Olsen has no evidence to support his assumption that water in these edge-of-field samples reflect solely runoff from a poultry litter-amended field or flowed into any water body in the IRW. *See* Ex. G (Olsen 2/2/08 Dep.) at 25:21-28:16. Nor is there any evidence to show that these samples are representative of what reaches surface waters. In short, Dr. Olsen’s testimony does not demonstrate that bacteria from poultry litter can survive to reach IRW waters, and supplies no basis to attribute bacteria in those waters to poultry as opposed to any other source.

Finally, Plaintiffs’ bacteria experts relied in large part on the bacteria sampling performed by Dr. Olsen and his firm CDM. *See, e.g.*, Teaf Rep. at ¶¶ 26, 27, 29, 52, 61, 63, 64 (Ex. D). However, the vast majority of that data was gathered in violation of EPA’s hold time requirements. As the Court found, “three-quarters of the water samples failed to comply with the EPA mandated six-hour hold time limits for enumerating bacteria in recreational water samples.” 7/28/09 Transcript at 252:2-4 (Ex. E); *see also* 7/29/09 Transcript at 377:2-6 (Ex. F)(“The sampling procedures underlying Dr. Olsen's report add to the unreliability. Four of the PCA components are bacteria and are unreliable, given the violation of hold time standards previously discussed yesterday by this Court.”). Because Plaintiffs’ bacteria case relies on indicator bacteria and EPA’s water quality guidelines as adopted by Oklahoma, such data must be

generated consistent with EPA's hold time requirements. *See* Dkt. No. 2090, at 9-12. While Plaintiffs note that they may also rely on USGS sampling, the edge-of-field samples that are critical to the experts' opinions for their "pathway" and "lines of evidence" analyses were gathered by CDM in violation of hold time requirements. *See* Opp. at 11;⁶ *see also, e.g.*, Ex. D, Teaf Rep. at ¶¶ 12, 13, 26 (relying on *inter alia* Harwood, Olsen, and CDM data); Ex. L, Harwood Rep. at ¶¶ 28, 30-36, 46, 52 (relying on *inter alia* Olsen, Teaf, and CDM data).⁷

Given the abundant sources of indicator bacteria in the IRW, given the environmental stresses to which bacteria from poultry litter are put, and given the fact that none of Plaintiffs' experts has done any fate and transport work necessary to track bacteria from poultry to IRW waters, it cannot simply be assumed merely on the basis of volume that bacteria in IRW waters come from poultry litter. None of the experts or other admissible authorities Plaintiffs cite bridge this gap to establish the basic possibility that bacteria from land-applied poultry litter, and not other sources, can survive to "actually reach[] the waters of the IRW." *Tyson*, 565 F.3d at 778. As a result, any references to bacteria or related health effects are irrelevant to the case. Bacterial presence in the waters of the IRW does nothing to compensate for the failure to show that it came from land-applied poultry litter. Evidence about it or about its health effects does not have "any tendency to make the existence of any fact that is of consequence to the

⁶ In preparation for trial, Defendants have now carefully reviewed Plaintiffs' surface water samples. The vast majority of these were gathered in violation of the hold time requirements. Defendants have not attached hereto each such lab report but can do so readily upon request. But attached as Exhibit M are sample lab reports for edge of field samples showing hold time violations as the tests were run more than 6 hours after sample collection.

⁷ In addition to their own experts, Plaintiffs rely obliquely on "government reports." Opp. at 12. But none of these reports undertook the fate and transport work necessary to prove causation as to these Defendants in this case. Rather, they make generalized observations regarding animal manure and bacteria. Plaintiffs specifically attach Oklahoma's not-yet-approved 2008 303(d) report, *id.* Ex. 4, which nowhere identifies poultry specifically as the source of any bacterial pollution, and moreover demonstrates convincingly that bacterial impairments are to be found across the State without regard to poultry operation density.

determination of the action more probable or less probable than it would be without the evidence.” Fed. R. Evid. 401.

B. Absent Proof Of Causation Linking Bacteria To Defendants, Discussion Of Bacteria-Related Health Effects Would Be Unfairly Prejudicial.

Even relevant evidence may be excluded where “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, [or] waste of time.” Fed. R. Evid. 403. Such is the case with evidence that has a “tendency to suggest a decision on an improper basis.” *United States v. Wilson*, 276 Fed.Appx. 859, 861 (10th Cir. 2008) (quoting *United States v. Curtis*, 344 F.3d 1057, 1067 (10th Cir. 2003)); *see also Stump v. Gates*, 211 F.3d 527, 534 (10th Cir. 2000).

Even if this Court were to conclude that bacteria evidence is relevant in some regard, it would be unfairly prejudicial to defendants and confusing to the factfinder to allow evidence regarding the health effects associated with bacteria when Plaintiffs cannot show that the bacteria derives from land-applied poultry litter. Permitting testimony about bacterial diseases would provoke precisely the kind of emotional response that Rule 403 precludes. *See United States v. Caraway*, 534 F.3d 1290, 1301 (10th Cir. 2008) (“To be unfairly prejudicial, the evidence must have ‘an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.’” (quoting Fed. R. Evid. 403 advisory committee’s note)).

CONCLUSION

For the foregoing reasons, Defendants respectfully request the Court to grant Defendants’ Motion pursuant to Federal Rules of Evidence 402 and 403.

Respectfully submitted,

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